No. 07-1494

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In The

Supreme Court of the United States

MEHRDAD SABZEVARI,

Petitioner,

v.

THE RELIABLE LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner seeks *certiorari* solely because he disagrees with the lower courts' factual findings and application of settled legal standards in this employment discrimination case. Petitioner's Statement of Questions Presented, however, attempts to present these insufficient grounds for Supreme Court review as purported opportunities to resolve important questions of federal law. Respondent submits the following Counter-Statement of Questions Presented to appropriately characterize the true nature of the review that Petitioner seeks.

1. Whether the Fifth Circuit Court of Appeals applied well-settled law in affirming summary judgment in favor of Respondent under Federal Rule of Civil Procedure 56(c) because Petitioner failed to raise a genuine issue of material fact on his Title VII failure-to-promote and retaliation claims.

2. Whether the Fifth Circuit Court of Appeals' evaluation of the evidentiary record and decision to affirm summary judgment on Petitioner's wrongful termination claim are consistent with the firmly-established doctrine of constructive discharge under Title VII.

THE PARTIES

1. Petitioner Mehrdad Sabzevari ("Petitioner") is a former assistant manager of The Reliable Life Insurance Company. Petitioner worked in Respondent's Beaumont, Texas district office.

2. Respondent The Reliable Life Insurance Company ("Respondent") markets life insurance products in Texas and other parts of the United States. Respondent is an "employer" as that term is defined by Title VII. Unitrin, Inc. is the parent corporation of Respondent. Unitrin, Inc. is publicly held and owns more than 10% of Respondent's stock.

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OPINIONS BELOW

The District Court's Opinion and Order granting complete summary judgment to Respondent on all of Petitioner's Title VII claims is unreported and is included at pages 11a-27a of the Appendix to the Petition. The District Court's Memorandum and Order partially vacating the summary judgment opinion, but refusing to alter the grant of complete summary judgment to Respondent, is also unreported and is attached at pages 28a-35a of the Appendix to the Petition.

The Judgment Order of the Court of Appeals affirming the District Court's grant of summary judgment to Respondent is unreported and is included at pages 1a-10a of the Appendix to the Petition. The Court of Appeals' Order denying Petitioner's request for rehearing is also unreported and is included at page 36a of the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is rife with inaccuracies, immaterial allegations, and omissions of critical undisputed facts. The following Statement of the Case accurately reflects the relevant portions of the undisputed factual record, as well as the lower courts' decisions dismissing Petitioner's Title VII discrimination and retaliation claims.

I. THE MATERIAL UNDISPUTED FACTS

A. Petitioner Becomes Employed by Respondent and Accepts a Transfer to the Beaumont District Office

Respondent hired Petitioner as an insurance agent in 1993. (App. 12a). In August 1996, Respondent promoted Petitioner to assistant manager in its Austin, Texas district office. (App. 12a). Respondent's Division Director at the time, Don Hirschfeld ("Hirschfeld"), was responsible for both the decision to hire Petitioner and the decision to promote him to assistant manager. (Record 397). In August 1999, Petitioner accepted a transfer to Respondent's district office in Beaumont, Texas, where he remained an assistant manager. (App. 12a).

Upon transferring to the Beaumont office, Petitioner lived in League City, Texas. (Record 322). Petitioner's residence in League City was not in Respondent's Beaumont district. (Record 310). Since at least the 1960s, however, Respondent has maintained a policy that managers must live within the district to which they are assigned. (App. 8a-9a). Indeed, all Beaumont managers – except for Petitioner – lived inside the Beaumont district's boundaries. (Record 320). Despite being requested to do so, Petitioner never moved within the Beaumont district. (Record 310).

B. Respondent Promotes Doug Dixon to District Manager in Sikeston, Missouri

In June 2000, Hirschfeld approached Doug Dixon ("Dixon"), another assistant manager in Respondent's Beaumont office, to inquire whether Dixon was interested in relocating to Sikeston, Missouri, as district manager. (Record 389). Hirschfeld interviewed Dixon for the Sikeston district manager position in July 2000, and later selected him for the job. (Record 391). Hirschfeld neither interviewed nor considered any other person for this position. (Record 320). Respondent formally promoted Dixon to Sikeston district manager in September 2000. (App. 2a, 12a).

At the meeting announcing Dixon's promotion, Petitioner declared that he did not receive the Sikeston district manager position because he is Iranian. (App. 2a). Petitioner, however, admittedly does not believe that Hirschfeld discriminated against him in the selection process for the Sikeston job or otherwise. (Record 333). Rather, Petitioner acknowledges that Hirschfeld was always courteous and respectful to him, and that Hirschfeld had no problem working with Iranians. (Record 333). Notably, Hirschfeld had already promoted Petitioner to assistant manager and also promoted Bob Sohrabi – another employee of Iranian national origin – to the district manager position in Waco, Texas prior to Dixon's promotion. (*See* Record 315, 397).

Hirschfeld selected Dixon for the Sikeston district manager position because he believed Dixon was the most qualified person for the job. (Record 396). Dixon had worked for Respondent since 1985 and had served as an assistant manager in the Beaumont office since 1996. (Record 386-87). Through Hirschfeld's personal observations of Dixon's career with Respondent, Hirschfeld believed that Dixon's strong leadership skills, work ethic, and work performance made him the best candidate for the Sikeston district manager position. (Record 396). Hirschfeld further provided unrebutted testimony that, even if he had considered Petitioner for the district manager position, he would nevertheless have selected Dixon over Petitioner because he knew Dixon to have superior leadership qualities, a longer tenure with Respondent, a longer tenure as an assistant manager, a superior work ethic, better management skills, a greater willingness to interact with agents, and a better attitude compared to Petitioner. (Record 397). Most, if not all, of these qualities are indisputably central to the qualifications of a district manager. (*See* Record 500-01).

C. Petitioner Seeks a Lateral Transfer to Assistant Manager in the Austin Office

In October 2000, Petitioner requested a transfer from his assistant manager position in Beaumont to an assistant manager position in Respondent's Austin district office. (Record 306). Petitioner did not receive the transfer to Austin that he requested. (Record

325). The record contains no evidence that the Austin assistant manager position would have involved a change in pay, promotional opportunities, or some other objective aspect of Petitioner's employment with Respondent. (App. 7a, 33a). At most, the record reflects Petitioner's mere belief that he would feel "more secure" about his future in Austin. (App. 20a; Record 325).

D. Petitioner Goes Out on Medical Leave and Accepts Employment with American National

In January 2001, Petitioner took a medical leave of absence from his employment with Respondent. (App. 12a). While on leave, Petitioner applied for employment with American National Insurance Company ("American National"). (App. 2a; Record 355-56). On March 8, 2001, Petitioner's doctor released him to return to work without restriction. (App. 2a). Petitioner, however, did not return to his job with Respondent. (App. 2a; Record 332). Instead, Petitioner accepted employment with American National on March 19, 2001. (App. 2a). Three days later, Respondent sent Petitioner a letter terminating his employment for failing to return to work after being released by his doctor. (App. 2a).

E. Petitioner Files an EEOC Charge and – 17 Months Later – Amends the Charge to Include a Failure-to-Promote Claim

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 15, 2001. (App. 2a). This charge alleged national origin discrimination and retaliation based on: (1) the denial of Petitioner's transfer request to Austin; and (2) Respondent's requests that Petitioner live within 25 miles of the Beaumont office like the other managers in his district. (App. 14a). On August 25, 2002 – more than 17 months after filing his charge with the EEOC – Petitioner amended the charge to add an allegation that Respondent failed to promote him to the Sikeston district manager position in September 2000 because of his Iranian national origin. (App. 3a).

II. PETITIONER'S CLAIMS

Petitioner filed a complaint against Respondent in the United States District Court for the Southern District of Texas on August 13, 2003, alleging multiple claims under Title VII of the Civil Rights Act of 1964, as amended. (Record 8-10). Petitioner alleged that Respondent did not promote him to the Sikeston district manager position because he is Iranian. Petitioner also alleged that Respondent took certain actions against him – denying his transfer request to Austin, requiring him to move within 25 miles of the Beaumont district office, and terminating his

employment – in retaliation for engaging in Title VII protected activity.

III. THE DISTRICT COURT DISMISSES ALL OF PETITIONER'S CLAIMS

On June 15, 2006, the District Court granted Respondent's motion for summary judgment and entered a final judgment dismissing all of Petitioner's claims. The District Court held that Petitioner's national origin discrimination claim was barred because Petitioner failed to exhaust his administrative remedies. (App. 16a-17a). Specifically, the District Court held that Petitioner did not submit his failure-to-promote claim to the EEOC within 300 days after he learned that Respondent promoted Dixon to Sikeston district manager. (App. 16a-17a). The District Court also held that Petitioner failed to establish a *prima facie* case of Title VII retaliation due to his failure to present evidence of an adverse employment action. (App. 20a, 22a). In so holding, the District Court found: (1) that Respondent did not terminate Petitioner, but, rather, Petitioner voluntarily quit (App. 22a); and (2) that Petitioner presented no competent evidence to show that the denied transfer to Austin would have been more than a purely lateral move (App. 20a).[1] Third, the District Court

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[1] In his Response to Respondent's Amended Motion for Summary Judgment, Petitioner expressly limited the scope of his retaliation claim to denial of the transfer to Austin and his termination from Respondent: "Mr. Sabzevari suffered two

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held that Petitioner's constructive discharge claim – if any existed – was barred because it, too, was not part of a timely filed charge of discrimination with the EEOC. (App. 25a).

On June 22, 2006, the Supreme Court clarified the adverse employment action standard for Title VII retaliation claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). Because *White* changed the law in the Fifth Circuit, Petitioner moved to vacate the District Court's summary judgment opinion and order dated June 15, 2006. On August 10, 2006, the District Court granted the motion to vacate in part, re-analyzed Petitioner's retaliation allegations under the new "materially adverse" standard endorsed in *White*, and issued an order declining to alter the summary judgment in favor of Respondent. In doing so, the District Court reiterated: (1) that Respondent did not terminate Petitioner (App. 35a); and (2) that the denied transfer to Austin was purely lateral and, therefore, could not satisfy even the more lenient "materially adverse" standard (App. 33a-34a).

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specific adverse employment actions. First, his transfer to Austin was denied and, second, he was terminated." (Record 448). The District Court therefore properly limited its analysis to these two adverse actions in analyzing Petitioner's retaliation claim. (*See* App. 18a).

IV. THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

Petitioner timely filed a Notice of Appeal from the District Court's final judgment on September 8, 2006. The Fifth Circuit Court of Appeals affirmed the judgment on January 31, 2008.

The Fifth Circuit declined to address whether Petitioner had failed to exhaust his administrative remedies on the failure-to-promote claim. (App. 4a). Instead, the Fifth Circuit opted to affirm summary judgment on grounds that Respondent articulated a legitimate, nondiscriminatory reason for promoting Dixon to district manager and that Petitioner could not show this reason was a pretext for national origin discrimination. (App. 5a-6a). Specifically, Respondent articulated that Hirschfeld selected Dixon for the Sikeston, Missouri district manager position because he was the most qualified candidate, and Petitioner failed to raise a material fact issue as to whether he was "clearly better qualified" than Dixon or that Dixon should have been disqualified from receiving the promotion. (App. 5a-6a).

The Fifth Circuit also affirmed the District Court's dismissal of the Title VII retaliation claim because: (1) Petitioner presented no competent evidence that the denied transfer to Austin was anything but purely lateral and, thus, was not an adverse employment action (App. 7a); (2) Petitioner was not terminated, but voluntarily quit his employment with

Respondent (App. 8a); and (3) Petitioner presented no competent evidence to either dispute the longstanding existence of Respondent's policy requiring managers to live within their respective districts or raise a fact issue that Respondent created this policy as a pretext for retaliating against Petitioner (App. 9a).

The Fifth Circuit did not resolve whether Petitioner had properly raised a constructive discharge claim either before the EEOC or in the District Court. The Fifth Circuit did, however, make the necessary findings to affirm dismissal of such a claim (if any) by concluding that Petitioner had presented legally insufficient evidence to establish a predicate hostile work environment claim. (App. 8a-9a).

Petitioner requested a panel rehearing of the Fifth Circuit's decision on February 13, 2008. In the request, Petitioner argued for a rehearing based on his allegations that the Fifth Circuit had made erroneous factual findings and misapplied the summary judgment standard under Federal Rule of Civil Procedure 56. The Fifth Circuit appropriately denied this petition for panel rehearing on February 26, 2008.

V. PETITIONER FILES A PETITION FOR WRIT OF *CERTIORARI*

Petitioner filed a Petition for Writ of *Certiorari* in this Honorable Court on May 27, 2008. The Petition was docketed on June 2, 2008.

REASONS FOR DENYING THE PETITION

I. THE CRITERIA OF SUPREME COURT RULE 10 ARE NOT SATISFIED

This Court has complete discretion in determining whether to grant a petition for writ of *certiorari* and, indeed, will grant a petition only for compelling reasons. (Sup. Ct. R. 10). As a general rule, a petition that complains of "erroneous factual findings" or "the misapplication of a properly stated rule of law" will not suffice. (Sup. Ct. R. 10). Rather, Petitioner must show that the Court of Appeals' decision to affirm summary judgment in favor of Respondent either: (1) conflicts with a decision of another United States court of appeals; or (2) decided an important, but unsettled, question of federal law in conflict with decisions of this Court. (*See* Sup. Ct. R. 10).

None of the circumstances under which the Supreme Court will consider granting *certiorari* exist in this case. The Court of Appeals did not decide an important question of unsettled federal law. Nor did it decide a federal question in a way that conflicts with another court of appeals or a decision of this Court. To be sure, the only purported "questions" of federal law raised by Petitioner – the basic summary judgment standard under Federal Rule of Civil Procedure 56(c), and the existence of constructive discharge claims under Title VII – are solidly and uniformly established across the federal courts.

Petitioner does not credibly assert that the courts below departed from these well-established legal

principles to announce or apply a new rule of law. Rather, Petitioner is simply dissatisfied with how the Fifth Circuit and the District Court applied rules of law (under Federal Rule of Civil Procedure 56 and Title VII) that have been universally accepted for decades. Practically speaking, Petitioner seeks *certiorari* for no other reason than to have this Court wade through the record in search of a genuine issue of material fact on his Title VII claims that both the Court of Appeals and District Court could not find. This is far from a compelling reason for this Court's review under Supreme Court Rule 10, and the Petition should be denied in its entirety.

II. THE COURT OF APPEALS APPLIED SETTLED LAW TO DECIDE THAT PETITIONER FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT ON HIS TITLE VII FAILURE-TO-PROMOTE AND RETALIATION CLAIMS

A. The Standard for Granting Summary Judgment Under Federal Rule of Civil Procedure 56 is Exceedingly Uniform and Well-Established

The guiding principles for applying the summary judgment standard in the Fifth Circuit are the same as in the other courts of appeals, and any assertion to the contrary by Petitioner is incorrect. The Fifth Circuit consistently holds that in determining whether a party has raised a genuine issue of material fact sufficient to stave off summary judgment, the

court "must view all facts and inferences in the light most favorable to the nonmoving party" and "must not weigh the evidence or evaluate the credibility of witnesses." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (internal quotations omitted); *see also Austin v. Will-Burt Co.*, 361 F.3d 862, 866 (5th Cir. 2004) (stating that, on a summary judgment analysis, the court does "not make credibility determinations or the weigh the evidence" and "should draw all reasonable inferences in favor of the nonmoving party"). One need only look to the cases cited in the Petition to see that these same summary judgment principles are also firmly established in the other circuits. (*See* Petition 8 (collecting cases)).

Equally well-established across the federal courts – including the Fifth Circuit – is the rule of law that Federal Rule of Civil Procedure 56:

> *mandates* the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial.

Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986)) (emphasis added); *accord, e.g.*, *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092, 1094 (8th Cir. 2007); *Bruner v. Baker*, 506 F.3d 1021, 1025 (10th Cir. 2007); *Smith v. Allen*, 502 F.3d 1255, 1265 (11th Cir. 2007). The reasons for this

rule are simple and necessary, but ultimately discounted by Petitioner:

> Notwithstanding the long history of summary judgment procedure, some parties will always complain that summary judgment unfairly deprives a party of the right to have a case heard by the trier of fact. No one, however, should be heard to question the fairness of requiring a party to meet basic evidentiary and procedural burdens in the trial of a case. Summary judgment requires no more.

Little, 37 F.3d at 1076. In this case, the Fifth Circuit did not misstate these well-established principles or depart from them to announce a new rule of law for determining whether a party is entitled to summary judgment under Rule 56.

The Fifth Circuit did not, as Petitioner erroneously contends, "render[ ] a decision that conflicts with decisions from the Supreme Court and decisions from other appellate courts."[2] (*See* Petition 7). To the

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[2] Petitioner's allusion to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), is potentially misleading. The Supreme Court did not grant *certiorari* in *Reeves* based on any perceived (or real) conflict among Fifth Circuit law and the law in other circuits regarding application of the standards for dismissal under Federal Rule of Civil Procedure 50 or 56. Rather, the Court granted *certiorari* on a Title VII question and, more specifically, "to resolve a conflict among the circuits as to whether a plaintiff's *prima facie* case of discrimination . . . , combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its

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contrary, the Fifth Circuit did nothing more than correctly apply settled rules of law to decide that Petitioner's claims could not survive summary judgment. As foreshadowed by the *en banc* Fifth Circuit in *Little*, Petitioner – undoubtedly like many plaintiffs before him – is simply dissatisfied with the outcome. Petitioner's mere dissatisfaction with the Fifth Circuit's application of settled law is not a sufficient reason for Supreme Court review. (*See* Sup. Ct. R. 10).

B. The Court of Appeals Correctly Applied the Established Summary Judgment Standard to Affirm Dismissal of Petitioner's Failure-to-Promote Claim

The Fifth Circuit correctly applied established law to decide that Petitioner failed to raise a genuine issue of material fact on his Title VII failure-to-promote claim. The Fifth Circuit did not weigh the material evidence on this (or any other) claim. It also did not assess the credibility of witnesses as to the material facts. Nor did it somehow fail to draw

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decision, is adequate to sustain a finding of liability for intentional discrimination" as opposed to requiring a plaintiff to submit evidence for a jury to find both that the employer's reason for the action was false and that the real reason was discrimination. *Reeves*, 120 S. Ct. at 2104-05. Here, Petitioner is not attempting to certify a Title VII question, and, as already noted, no conflict exists among the courts of appeals regarding the summary judgment standards under Federal Rule of Civil Procedure 56.

reasonable inferences on material matters in favor of Petitioner. In arguing to the contrary, Petitioner ignores the specific holdings of the Fifth Circuit and focuses on immaterial facts.

The Fifth Circuit correctly concluded that Petitioner failed to raise a material fact issue of pretext by showing that he was "clearly better qualified" than Dixon for the Sikeston district manager position. *See EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1445 (5th Cir. 1995) (holding that employee must be "clearly better qualified" rather than "merely better or as qualified" to establish pretext on failure-to-promote claim). Petitioner claims that the Fifth Circuit "violated" Federal Rule of Civil Procedure 56 by misapprehending evidence that Petitioner was a better recruiter than Dixon. Respondent, however, presented unrebutted testimony that recruiting was merely one of a number of credentials – including leadership skills, longevity, and being able to take care of policyholders and agents – germane to the district manager position. (*See* Record 500-01). On this evidence, the Fifth Circuit determined under Rule 56 that *even if accepting as true* that "Petitioner established that he had superior recruiting skills, this would not raise an issue as to whether he was 'clearly better qualified' on the whole." (App. 6a). The Fifth Circuit's analysis and decision to dismiss Petitioner's failure-to-promote claim was a straightforward

application of established summary judgment principles.[3]

The Fifth Circuit also correctly concluded that Petitioner failed to establish pretext on the failure-to-promote claim by showing that Dixon should have been disqualified from the Sikeston district manager position. Petitioner claims that the Fifth Circuit misapplied Rule 56 by disregarding the fact that Dixon incurred two infractions of company policy during his career with Respondent (and years prior to his promotion to Sikeston district manager). However, Dixon's infractions did not create a fact issue which was either genuine or material to Petitioner's failure-to-promote claim. In particular, Petitioner offered no evidence of a company policy or past promotional decision to support the unfounded conclusion that these remote infractions forever rendered Dixon ineligible for a district manager position with Respondent. Nor did Petitioner offer any other

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[3] A case cited by Petitioner, *Hux v. City of Newport News*, 451 F.3d 311 (4th Cir. 2006), squarely supports the appropriateness of the Fifth Circuit's summary judgment analysis and ultimate decision to dismiss Petitioner's failure-to-promote claim. In *Hux*, the Fourth Circuit relied upon *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), to likewise dismiss a failure-to-promote claim after holding that "in a suit alleging failure to promote, a plaintiff seeking to rebut an employer's reliance on inferior job qualifications cannot simply compare herself to other employees on the basis of a single evaluative factor artificially severed from the employer's focus on multiple factors in combination." *Hux*, 451 F.3d at 315. That is precisely what Petitioner attempted to do in this case.

evidence capable of establishing that the effect of Dixon's two policy infractions was automatic disqualification from promotion. The Fifth Circuit, therefore, correctly applied established summary judgment standards in deciding that Petitioner failed to raise an issue of material fact on the pretext prong of his failure-to-promote claim.[4]

Additionally, if Petitioner had raised a material fact issue as to pretext, the Fifth Circuit could have also affirmed summary judgment on the failure-to-promote claim on alternative grounds. Specifically, summary judgment was also proper because, as the District Court correctly held, Petitioner did not timely submit his failure-to-promote allegation to the EEOC. (*See* App. 16a-17a); 42 U.S.C. § 2000e-5(e).

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[4] Petitioner curiously devotes a substantial portion of his Petition to mischaracterizing the testimony of Respondent's Director of Agencies, Grant Pillow, to support his failure-to-promote claim. The unrebutted evidence shows that Hirschfeld – not Pillow – selected Dixon for promotion to Sikeston district manager over Petitioner. Additionally, Petitioner's statement that "[a]ccording to Mr. Pillow, Mr. Sabzevari was more qualified for the District Manager position since he did not have a history of recruiting problems" is false. (*See* Petition 10). Pillow simply made no such statement. Rather, Pillow straightforwardly testified that recruiting was merely one of a number of relevant qualities of a district manager. (*See* Record 500-01). Perhaps most importantly, however, Petitioner offered no evidence to cast doubt upon the legitimacy of Hirschfeld's basis for selecting Dixon for the Sikeston position. (*See* Record 396-97). This is an additional compelling reason why Petitioner failed to create a material fact issue on the pretext prong of his failure-to-promote claim.

C. The Court of Appeals Correctly Applied the Established Summary Judgment Standard to Dismiss Petitioner's Retaliation Claims

The Fifth Circuit also correctly applied well-settled summary judgment standards to hold that Petitioner failed to raise a material fact issue on his Title VII retaliation claims. As with its analysis of Petitioner's failure-to-promote claim, the Fifth Circuit did not weigh material evidence, make credibility determinations, or refuse to draw justified inferences in Petitioner's favor. This is true with respect to Petitioner's retaliation claims based on both Respondent's denial of his request to transfer to Austin and Respondent's policy requiring Petitioner to move within the Beaumont district.[5]

The Fifth Circuit correctly concluded that Petitioner failed to present evidence sufficient to establish that the denied transfer to Austin was an adverse employment action. A "purely lateral transfer" that does not involve a demotion (or promotion), reduction (or increase) in pay, or "more than a minor change in working conditions," but, rather, involves only an employee's "subjective preference for one position over another" is not a materially adverse employment

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[5] The Fifth Circuit also correctly analyzed and affirmed dismissal of Petitioner's retaliation claim based on his purported termination from Respondent. Petitioner does not allege in his Petition that the Fifth Circuit misapplied the summary judgment standards with respect to this claim.

action under Title VII. *Nichols v. So. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780-81 (7th Cir. 2007); *see also Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) ("A survey of the relevant case law shows that the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep."). Petitioner offered no evidence that the transfer he sought from the assistant manager position in Beaumont to the same position in Austin would have involved any objective change in the terms and conditions of his employment.[6] This precluded Petitioner from proving that Respondent's denial of his Austin transfer request was an adverse employment action under the "materially adverse" standard announced in *White*. Therefore, Petitioner failed to offer evidence on an essential element of his *prima facie* case, and the Fifth Circuit correctly applied the well-established summary judgment standard to affirm dismissal of this retaliation claim pursuant to Rule 56.

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[6] The Petition does not allege that the Fifth Circuit overlooked objective evidence, such as increased pay or promotional opportunities, that would have established the adverse employment action element of his retaliation claim. Instead, Petitioner appears to allege that the Fifth Circuit misapplied established summary judgment principles by ignoring disputed allegations that the purely lateral transfer was discriminatory. (*See* Petition 12-13). These allegations, which might be relevant to a pretext analysis, are of no moment because they are immaterial to determining whether Petitioner presented sufficient evidence of an adverse employment action to make out a *prima facie* case.

The Fifth Circuit also correctly decided that Petitioner failed to raise a genuine issue of material fact as to whether Respondent's policy requiring managers to live within the Beaumont district (and within 25 miles of the Beaumont district office) was a pretext for retaliation. Petitioner alleged that this policy was pretextual on grounds that Respondent created the policy solely to harass him and, in fact, applied it only to him. Respondent, however, presented unrebutted testimony that this policy had been in place since the 1960s. Respondent also presented unrebutted evidence that every other Beaumont manager lived within the Beaumont district. Petitioner offered no evidence to dispute the existence of these material facts. Specifically, Petitioner did not present evidence disputing the existence of this company policy, or to dispute that it had been in place for more than 30 years. On this evidence, the Fifth Circuit properly analyzed the material facts and properly found no genuine issue of material fact that this company policy was a pretext for retaliating against Petitioner due to his complaints of discrimination.

III. THE COURT OF APPEALS' ANALYSIS AND ADJUDICATION OF PETITIONER'S WRONGFUL TERMINATION CLAIM DOES NOT CONFLICT WITH THE ESTABLISHED DOCTRINE OF CONSTRUCTIVE DISCHARGE

A. The Doctrine of Constructive Discharge Under Title VII is Solidly Established Across the Federal Courts, Including the Fifth Circuit

The recognition of constructive discharge claims under Title VII is universal. *See Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351-52 (2004). A Title VII constructive discharge claim in any federal court requires a plaintiff to prove "working conditions so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 124 S. Ct. at 2354. This was the law in the Fifth Circuit prior to *Suders* and, to be sure, remains the law after *Suders*. *See, e.g.*, *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 319 (5th Cir. 1997); *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157, 167 (5th Cir. 2007).

In constructive discharge cases, the "[c]reation of a hostile work environment is a necessary predicate" to a claim of constructive discharge under Title VII.[7] *Suders*, 124 S. Ct. at 2356. The Fifth Circuit has

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[7] Petitioner plainly asserts that the basis of his constructive discharge claim is an alleged hostile work environment. (*See* Petition 17).

consistently interpreted this well-established rule to practically mean what it says: where a party's hostile work environment claim fails, so too must the overlaying constructive discharge claim. *See, e.g.*, *Weller v. Citation Oil & Gas Corp.*, 112 F.3d 710, 718-19 (5th Cir. 1996) ("Because [plaintiff-appellant] failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well."); *Vallecillo v. HUD*, 155 F.App'x 764, 768 (5th Cir. 2005) ("We agree with the district court's reasoning that because Appellant's hostile work environment claim has failed, his constructive discharge claim must also fail."). This same principle of law is also widely recognized by other courts of appeals. *See, e.g.*, *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47-48 (1st Cir. 1998) ("Because the jury . . . returned an adverse verdict on [plaintiff-appellant's] hostile work environment claim, he cannot succeed on his retaliatory constructive discharge claim."); *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (holding that the factual basis of a constructive discharge claim "rises or falls on the determination of the hostile work environment facts"); *Roney v. Ill. Dep't of Transp.*, 474 F.3d 455, 463 (7th Cir. 2007) ("Because we find that [plaintiff-appellant] was not subject to a hostile work environment, his claim of constructive discharge is automatically foreclosed."); *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) ("Where a plaintiff fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for her to

meet the higher standard of constructive discharge: conditions so intolerable that a reasonable person would leave the job.").

The above-cited cases show that the rules of law which have developed under the Title VII constructive discharge doctrine are uniform and well-established. The Fifth Circuit did not abandon or depart from these established rules in the adjudication of Petitioner's wrongful termination claim. And, notwithstanding Petitioner's unfounded and confusing contention that the Fifth Circuit's resolution of this case conflicts with Supreme Court authority by punishing Petitioner's so-called "mitigation efforts," the decision in this case is fully consistent with *Suders*. Review by this Court is accordingly not justified under Supreme Court Rule 10, and the Petition should be denied in its entirety.

B. The Court of Appeals' Adjudication of Petitioner's Wrongful Termination Claim is Consistent With *Suders* and the Constructive Discharge Doctrine

The Fifth Circuit's decision to affirm summary judgment comports with *Suders* and the established doctrine of constructive discharge under Title VII. Petitioner is wrong in asserting that the Fifth Circuit's decision sets up a new contradictory standard that "if a person 'effectively quits' there can't be a wrongful discharge claim even if the employee was constructively discharged." (*See* Petition 17). A

cursory review of the opinion affirming summary judgment reveals that the Fifth Circuit did no such thing. To the contrary, the Fifth Circuit applied established law to resolve Petitioner's wrongful termination claim in favor of Respondent by holding: (1) that Petitioner was not terminated, but, rather, quit his job with Respondent[8] (App. 7a); and (2) that Petitioner failed as a matter of law to show the existence of a hostile work environment (App. 8a-9a).

As discussed above, the law across the federal courts is clear: a party cannot prove a constructive discharge claim without first establishing a predicate hostile work environment. *See, e.g.*, *Weller*, 112 F.3d at 718-19. The simple fact that the Fifth Circuit refrained from expressly stating this settled principle in affirming dismissal of Petitioner's wrongful termination claim did not, as Petitioner contends, thrust the Fifth's Circuit's law regarding constructive discharge into irreconcilable conflict with decisions of this Court and other courts of appeals. The Fifth Circuit correctly held that Petitioner failed to present evidence sufficient to maintain a hostile work environment claim. Therefore – by operation of firmly

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[8] The Fifth Circuit correctly held that Petitioner voluntarily quit his job with Respondent. The undisputed evidence shows: (1) Petitioner failed to return to work on March 8, 2001 when medically released; (2) Petitioner accepted employment with American National no later than March 19, 2001; and (3) Respondent sent Petitioner a letter on March 22, 2001 terminating his employment for his failure to return to work. (App. 2a-3a).

established law – the Fifth Circuit also correctly decided that Respondent was entitled to summary judgment on Petitioner's constructive discharge claim.

Even if Petitioner had raised a fact issue of a predicate hostile work environment, the Fifth Circuit equally could have affirmed the District Court's dismissal of the constructive discharge claim because Petitioner failed to exhaust his administrative remedies. Specifically, Respondent was also entitled to summary judgment because, as the District Court correctly held, Petitioner failed to submit a constructive discharge (or hostile work environment) allegation to the EEOC. (App. 25a); *see* 42 U.S.C. § 2000e-5(e).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that Petitioner's request for a writ of *certiorari* to review the decision of the Fifth Circuit Court of Appeals be denied in its entirety.

Dated: July 1, 2008

Respectfully submitted,

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